



Background:

- The *Civil Rights Act* requires the U.S. Equal Employment Opportunity Commission (EEOC) to attempt to “conciliate”—or work with an employer to resolve a discrimination claim—before court proceedings begin in cases where EEOC believes workplace discrimination has occurred. However, **EEOC has not significantly changed its conciliation rules since they were established more than 43 years ago.**
- **Successful conciliations provide immediate relief and justice** to impacted employees, saving them time, money, and the uncertainties and frustrations that come with months- or years-long court cases. If conciliation fails, then EEOC can proceed with a lawsuit against the employer or, if the agency does not do so, the employee may sue the employer.
- Over the past 40 years, EEOC’s conciliation practices lacked transparency, consistency, and efficacy. Currently, **conciliations are only successful in approximately 41 percent of cases** where EEOC believes discrimination has occurred, and one-third of employers decline to participate at all.
- In 2009, an Iowa federal judge in *EEOC v. CRST Van Expedited, Inc.*, accused EEOC of taking a “sue first, ask questions later” approach to enforcement, which has resulted in substantial awards of attorneys’ fees against EEOC for pursuing ill-advised cases over the years.
 - For example, in 2013, the U.S. Court of Appeals for the 6th Circuit affirmed an award of more than \$750,000 in attorneys’ fees and costs against EEOC, finding the agency’s allegations against the defendant were groundless.
- In 2015, the Supreme Court harshly criticized EEOC’s conciliation process in the *Mach Mining* decision, which held that a court may review whether EEOC satisfied its statutory obligation to engage in conciliation before filing a lawsuit.
 - The agency claimed that two “bookend” letters were all that was needed to satisfy the statutory conciliation requirement: one at the beginning of the process announcing a finding of discrimination and one at the end stating that conciliation had failed.
 - The Supreme Court disagreed and ruled that EEOC must disclose to the employer “what practice has harmed which person or class” and provide the employer an “opportunity to discuss the matter in an effort to achieve voluntary compliance.”

The EEOC Conciliation Rule:

- To fix the deficiencies recognized by the Supreme Court in *Mach Mining*, after notice-and-comment rulemaking, **EEOC published a final rule on January 14, 2021, updating its conciliation procedures, strengthening accountability and due process.**

- The rule fixes the failed EEOC conciliation process by **enhancing fairness and transparency, avoiding expensive and time-consuming litigation, and ensuring that EEOC honors its statutory obligations to engage in good faith conciliation efforts before filing lawsuits.**
- Specifically, the rule requires EEOC to provide employers with basic information supporting the agency's finding of discrimination and monetary damages, including:
 - A written summary of known facts and non-privileged information relied upon by EEOC in its finding of cause to believe discrimination has occurred, as well as a written summary of the agency's legal basis for finding reasonable cause;
 - A written explanation of the basis for monetary or other relief, including calculations;
 - A written notice if EEOC has designated the case as involving a class of alleged victims, including the basis for the designation, and the criteria used to determine who is in the class and its potential size; and,
 - In addition, EEOC must provide the employer at least 14 days to respond to the conciliation proposal.
- To protect privacy, EEOC will not disclose the identity of potentially aggrieved workers if the workers request anonymity.
 - Moreover, EEOC will not disclose any information where another federal law prohibits disclosure or that is protected by privilege, including confidential attorney work product related to litigation strategy.
- To ensure fairness, any information provided to the employer will also be provided, upon request, to the worker who has filed a discrimination charge with EEOC.
- The rule does not advantage employers in potential litigation because EEOC will not provide privileged attorney work product to employers.
- **Conciliation remains voluntary under the rule for the employer and the worker.**
- The rule does not burden EEOC's staff.
 - The agency has stated that compliance with the rule will not divert agency resources because the disclosures required by the rule are straightforward.
 - Moreover, the rule only applies prospectively so it will not interfere with current cases.
- **The rule does not increase costs to taxpayers.** EEOC has stated that its operating budget can absorb the costs of the rule's implementation.
- In April 2021, trade associations including **the National Federation of Independent Business, the National Retail Federation, and the National Restaurant Association sent a letter to Congress opposing S.J. Res. 13** because the new conciliation procedures “strike a fair balance, with EEOC only disclosing basic legal and factual information about the underlying claim.”

BOTTOM LINE: S.J. Res. 13 would nullify the EEOC conciliation rule and overturn these necessary and appropriate reforms, harming victims of discrimination by delaying monetary relief and justice in their cases and precluding EEOC from enacting these reforms in the future.